No. 17-35105

In the United States Court of Appeals for the Ninth Circuit

State of Washington; State of Minnesota,
Plaintiffs-Appellees,

v.

Donald J. Trump, President of the United States; U.S. Department of Homeland Security; Rex W. Tillerson, Secretary of State; John F. Kelly, Secretary of the Department of Homeland Security; United States of America,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington

MOTION FOR LEAVE TO FILE BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

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Motion for Leave to File Brief

Amicus curiae the State of Texas respectfully moves for leave to file a brief of 8,965 words as amicus curiae in support of rehearing en banc. This motion is unopposed and is accompanied by the proposed brief and Form 8 certification.

1. On January 27, 2017, the President issued Executive Order 13,769, determining that "[d]eteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States" and taking additional steps "to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism." 82 Fed. Reg. 8977, 8977 (Feb. 1, 2017). On February 3, 2017, the district court temporarily enjoined the Executive Order in its entirety. On February 9, 2017, a panel of this Court denied the Executive Branch's motion for a stay pending appeal of that injunctive relief.

2. On February 10, 2017, this Court noted that it was considering whether the request for a stay pending appeal should be reheard en banc. This Court directed the parties to file simultaneous briefs of up to 14,000 words on that issue by Thursday, February 16, 2017.

3. Federal Rule of Appellate Procedure 29 permits a State to file an amicus brief without the parties' consent or leave of court "during a court's consideration of whether to grant panel rehearing on rehearing en banc, unless a local rule or order in a case provides otherwise." Fed. R. App. P. 29(b)(1), (2). That rule appears to govern here because no circuit rule provides otherwise. Circuit Rule 29-2 provides that a State may file an amicus brief without the parties' consent or leave of court

"when the Court is considering a petition for panel or en banc rehearing," and that "any other amicus curiae" may file only by leave of court or if all parties consent. Neither clause applies here: the Court does not have a "petition" for en banc rehearing (because the Court raised the issue sua sponte), yet movant is not an "other amicus curiae" than those listed in the first clause of the second sentence of Circuit Rule 29-2(a) (because movant is a State).

4. Nonetheless, in an abundance of caution given potential confusion, amicus respectfully moves for any necessary leave to file an amicus brief at this stage, in support of the rehearing en banc currently being considered by the Court. Even if Circuit Rule 29-2 does not expressly address sua sponte consideration of en banc review, an amicus brief by a State at this stage is allowed by Federal Rule of Appellate Procedure 29(b). And the attached proposed brief includes material that is "desirable" and "relevant to the disposition of the case." Fed. R. App. P. 29(a)(3); *see* 9th Cir. R. 29-2(b). The amicus brief provides an overview of the federal immigration laws against which plaintiffs' statutory and constitutional claims should be evaluated; explains that the Executive Order reflects a policy decision delegated to the Executive Branch expressly by Congress, and was issued after multiple federal officials drew public attention to serious flaws in the preexisting vetting scheme for aliens residing abroad who wish to enter this country under visas or as refugees; and draws the Court's attention to authorities relevant to the extension of constitutional rights that plaintiffs advocate here. The attached amicus brief is filed before the February 16, 2017 deadline for the parties' simultaneous briefs on whether the Court should grant rehearing en banc.

5. Amicus also requests leave to exceed the word limit by filing the attached brief of 8,965 words. *See* 9th Cir. R. 29-2(c), 32-1(a). This is a case of national interest with important and far-reaching foreign-affairs and national-security implications. Every State has a substantial interest in the health and welfare of their citizens, but the States must rely on the federal Executive to determine when the entry of aliens should be suspended for public-safety reasons under a regime crafted by the States' elected representatives in Congress. *See generally Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). The State of Texas thus has a substantial interest in the federal government having the latitude to make policy judgments reserved to it by statute, and inherent in this country's nature as a sovereign, regarding the terms and conditions for whether aliens may enter the country.

6. Amicus has endeavored to assist the Court in resolving the weighty issues in this case in as few words as possible. Critical to that effort is an understanding of the structure of our nation's immigration laws, which the attached brief provides, as well as key precedents bearing on the sweeping constitutional theories that plaintiffs argue. The attached amicus brief supporting rehearing en banc uses fewer than two-thirds of the 14,000 words that this Court has allowed for the parties' supplemental en banc briefs and is fewer than the total words allowed if amicus had filed briefs at

both the panel stage and this stage.[1] Amicus submits that granting the request to exceed the word limit is particularly appropriate in light of the fact that over fifteen amicus briefs were submitted in support of appellees at the panel-hearing stage.

7. Appellants consent to the relief requested in this motion, and appellees take no position on it.

Conclusion

The State of Texas respectfully requests leave to file the attached brief as amicus curiae supporting rehearing en banc.

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[1] "[A]micus filings during a court's initial consideration of a case on the merits," Fed. R. App. P. 29(a)(1), have a word limit of 7,000 words, as one-half of the party-brief limit. Fed. R. App. P. 29(a)(5); 9th Cir. R. 32-1(a). A second brief "during a court's consideration of whether to grant panel rehearing or rehearing en banc," Fed. R. App. P. 29(b)(1), then has either a word limit of 2,600 words, Fed. R. App. P. 29(b)(4), or an alternative 4,200-word limit for briefs while a "petition for rehearing" is pending, 9th Cir. R. 29-2(c)(2). The total words permitted for amicus briefs at the initial and en-banc-consideration stages is thus either 9,600 or 11,200.

Respectfully submitted.

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Certificate of Conference

This motion has been conferenced with counsel for the parties, and neither will oppose the relief requested in this motion. Appellants consent to that relief, and appellees take no position on it.

s/ Scott A. Keller
Scott A. Keller

Certificate of Service

On February 15, 2017, this motion was served by CM/ECF on the following counsel for the parties:

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s/ Scott A. Keller
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Circuit Rule 32-2(a) Declaration

Pursuant to Circuit Rule 32-2(a), I declare that the State of Texas's motion for its amicus brief to exceed the type-volume limit is supported by substantial need. This is a case of national interest with important and far-reaching foreign-affairs and national-security implications. The State of Texas has a substantial interest in the health and welfare of its citizens, and the States rely on the federal Executive to restrict the entry of aliens for public-safety reasons under a regime crafted by the States' elected representatives in Congress. *See Arizona*, 132 S. Ct. at 2507. The State of Texas thus has a substantial interest in the federal government having the latitude to make the policy judgments reserved to it by statute, and inherent in this country's nature as a sovereign, regarding the terms and conditions for whether aliens may enter the country.

I further declare that amicus has been diligent in endeavoring to assist the Court in resolving the weighty issues in this case in as few words as possible. Critical to that effort is an understanding of the structure of our nation's immigration laws, which the attached brief provides, as well as key precedents bearing on the sweeping constitutional theories that plaintiffs argue. The attached amicus brief supporting rehearing en banc uses fewer than 9,000 words to achieve these ends.

s/ Scott A. Keller
Scott A. Keller